83-411

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GULF OIL CORPORATION,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
PHILADELPHIA GAS WORKS,
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
WASHINGTON URBAN LEAGUE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission has authority, under Sections 7(c) and 16 of the Natural Gas Act, to (i) modify retroactively its orders as to the amounts of "refunds" and rates of interest thereon after such orders have been affirmed by a court of appeals and are final, and (ii) compel specific performance of a natural gas sales contract and at the same time prohibit the full recoupment of "refund" or "damage" payments as was permitted by the prior orders affirmed on judicial review.

2. Whether issuance of a notice of proposed rulemaking and rulemaking orders changing rates of interest generally applicable to amounts collected subject to refund under Section 4 of the Natural Gas Act constitutes adequate "notice" that such changes later would supersede lower rates of interest specifically prescribed in a prior adjudicatory proceeding by Commission orders which were affirmed and are final.

3. Whether a court of appeals reviewing the Commission's construction of the *force majeure* provision of a natural gas sales contract which is certificated and regulated under the Natural Gas Act may: (i) treat the express provisions of the unconditioned, certificated contract as not controlling, (ii) apply principles and precedents of federal government contracts law instead of state contract law, and (iii) substitute its views for the Commission's findings as to sufficiency of the proof of occurrence and applicability of *force majeure* events under the regulated contract.

PARTIES TO THE PROCEEDING

Gulf Oil Corporation, the petitioner here, was a petitioner below on refund and interest rate issues and an intervenor below supporting the respondent Federal Energy Regulatory Commission on the *force majeure* contract issues. Respondents here are the Federal Energy Regulatory Commission, respondent below on all issues, and Philadelphia Gas Works, Public Service Commission of the State of New York, and Washington Urban League, which were petitioners below on the *force majeure* contract issues and intervenors below supporting the respondent Commission on the refund and interest rate issues. Texas Eastern Transmission Corporation, Consolidated Edison Company of New York, Inc., New Jersey Natural Gas Company, and Public Service Electric and Gas Company were intervenors below.*

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* The following were parties to the proceedings before the Commission but did not participate in the proceedings before the court of appeals: Algonquin Gas Transmission Co.; Associated Gas Distributors; Atlantic Richfield Co.; Brooklyn Union Gas Co.; Carnegie Natural Gas Co.; Columbia Gas Transmission Corp.; Consolidated Gas Supply Corp.; Equitable Gas Co.; Hoosier Gas Corp.; Indiana Gas Co., Inc.; Long Island Lighting Co.; Louisville Gas & Electric Co.; Memphis Light, Gas & Water Division; Mississippi Valley Gas Co.; New England State Agencies; New England Gas Distribution Companies; Philadelphia Electric Co.; Public Utilities Commission of Ohio; Southern Indiana Gas & Electric Co.; Southern Natural Gas Co.; Southern New England Regulatory Coordination Project; State of New Jersey; Students Opposing Unfair Practices, Inc.; Terre Haute Gas Corp.; Texas Gas Transmission Corp.; The East Ohio Gas Co.; The Peoples Natural Gas Co.; The State of Louisiana; and Western Kentucky Gas Co.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Gulf Oil Corporation petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in this case.*

OPINIONS BELOW

The opinion of the court of appeals, as amended (App. 1a-26a, 27a-30a), is reported at 706 F.2d 744. The order denying Gulf's timely petition for rehearing (App. 113a-115a) is not reported. The orders of the Federal Energy Regulatory Commission [1] on the refund, damages, and in-

[1] Herein, "Commission" refers to the Federal Power Commission, and its statutory successor, on and after October 1, 1977, the Federal Energy Regulatory Commission. Department of Energy Organization Act §§ 204, 401, 402(a), 42 U.S.C. §§ 7134, 7171, 7172(a).

* Petitioner Gulf Oil Corporation is a publicly-held corporation and has no parent company or affiliates and subsidiaries except wholly owned affiliates and subsidiaries. See Rule 28.1.

terest rate issues (App. 55a, 65a, 91a) are reported at 6 F.E.R.C. 61087 (CCH 1979) (¶ 61040), 17 F.E.R.C. 61513 (CCH 1982) (¶ 61264), 18 F.E.R.C. 61271 (CCH 1982) (¶ 61135), and 18 F.E.R.C. 61658 (CCH 1982) (¶ 61307). The Commission's order on the *force majeure* issues (App. 30a) is reported at 18 F.E.R.C. 61063 (CCH 1982) (¶ 61048); the order denying rehearing (App. 53a) is not reported.

JURISDICTION

The revised judgment of the court of appeals (App. 105a-108a) and the order denying Gulf's timely petition for rehearing (App. 113a-115a) were entered on June 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, the Natural Gas Policy Act, 15 U.S.C. § 3301, *et seq.*, the Federal Power Act, 16 U.S.C. § 792, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, are set forth at App. 116a-132a.

STATEMENT

1. *The Contract.* In 1963, the Commission issued a certificate under Section 7 of the Natural Gas Act (15 U.S.C. § 717f) authorizing Gulf to sell natural gas to Texas Eastern Transmission Corporation, an interstate pipeline, in accordance with an agreement between these parties.[2] In the Contract, Gulf agreed to deliver approximately 4.44 trillion cubic feet of gas over approximately twenty-six years, one of the largest quantities and longest terms in any interstate gas sales contract in the United States.

Gulf agreed to deliver a "daily contract quantity" of 500,000,000 cubic feet (500,000 Mcf) per day. Gulf also

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[2] *Texas Eastern Transmission Corp.*, 30 F.P.C. 1559 (1963).

agreed to have available up to a maximum of 125% of this daily contract quantity (625,000 Mcf) on any day that Texas Eastern requests delivery of that volume, subject to the *force majeure* and other provisions of the contract.

The certificate authorized Gulf's sale in accordance with the Contract without conditions to or modification of its provisions by the Commission. Gulf commenced deliveries in 1964.

2. *The 1976 Orders.* During the national shortage of natural gas in the 1970s, the Commission found that Gulf, commencing in 1971, failed to deliver volumes of gas in accordance with its certificate and contract; ordered "refunds" of amounts then estimated to exceed $100,000,000 for the past underdeliveries; and ordered current and future deliveries in specific performance of the contract.[3]

The Commission then held that Gulf (a) is required to deliver 625,000 Mcf on each day that Texas Eastern nominates that volume, unless prevented from doing so by *force majeure*; and (b) is required to make payments, with interest, to Texas Eastern to be flowed through to its customers as "compensation" for "damages" due to past underdeliveries, adjusted for *force majeure*.

However, the Commission also held that Gulf could not be required *both* to deliver the full contract volumes *and* to pay unrecoupable damages. The Commission therefore provided in its order for future recoupment by Gulf of all its payments, including both principal and interest, "refunded" to Texas Eastern. This was to be accomplished by reduction of the "refund" by certain amounts on any day that Gulf delivered in excess of 625,000 Mcf to Texas Eastern, and by rate adjustments for any remaining amounts in later years when the volume still to

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[3] *Gulf Oil Corp.*, 56 F.P.C. 2293, reh. denied, 56 F.P.C. 3492 (1976), aff'd, *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588 (3rd Cir. 1977), cert. denied, 434 U.S. 1062 (1978).

be delivered under the contract equaled the remaining past deficiency. The Commission thus concluded that ultimately Texas Eastern would receive all of the gas, and Gulf would receive all of the compensation, that the parties had agreed to under the long term of the 1964 Contract.

On review in 1977, the Third Circuit generally affirmed the Commission's 1976 orders. The court agreed that under the Natural Gas Act and principles of contract law, Gulf could not be required to pay unrecoupable damages and at the same time held to specific performance of the Contract. The court, therefore, held that Gulf was entitled to recoup all amounts refunded to Texas Eastern, including the accumulated interest. 563 F.2d at 609. This Court denied certiorari.

3. *The 1979 Procedural Order and Evidence.* Almost eleven months after this Court denied Gulf's petition for writ of certiorari in 1978, the Commission issued an order establishing procedures to resolve remaining issues. App. 55a-64a. The Commission first ordered a formal hearing on Gulf's submissions showing that some of the past underdeliveries were excused by *force majeure* under the terms of the Contract. App. 61a-62a. The Commission next held, without further hearings, that Gulf could *not* recoup the interest on the refund principal which accrued after December 15, 1976, and that such interest was to be flowed through irretrievably to Texas Eastern's customers. App. 59a. The Commission further requested "comments" on other terms and provisions of Texas Eastern's proposed plan for flowing through Gulf's "refunds" to its customers. App. 60a, 63a.

Thereafter, in the "comments" phase, Gulf submitted evidence showing that Texas Eastern's customers will suffer *no* ultimate "damages" due to Gulf's underdeliveries between 1971 and 1977, but will realize net benefits (ranging from $225 million to $802 million) due to Gulf's increased future deliveries in the 1980s of gas which is

and will be priced substantially below other available supplies.[4] App. 71a. Gulf also argued that under the Commission's now-final 1976 orders, Texas Eastern's customers must prove that they will suffer net damages over the life of the Contract before they are entitled to receive any "refunds" from Gulf (App. 71a), and that Gulf is entitled to recoup *all* accumulated interest refunded to Texas Eastern, not merely a portion of the interest as the Commission's 1979 order held (App. 81a). Further, Gulf argued that the 1979 order was in conflict with the 1976 orders and with the limitations on the Commission's authority as to "damages" and reparations under the Natural Gas Act. App. 71a.

4. *1981 Order On Refunds and Interest.* Almost thirty-two months after the last comments were filed, the Commission issued an order in 1981 denying Gulf's petition for rehearing of its 1979 order and resolving the remaining issues, other than the *force majeure* questions. App. 65a.

The Commission held that Texas Eastern's customers were not required to show that they had suffered any damages as a result of Gulf's past delays in deliveries, that it was "irrelevant" that Texas Eastern's customers will benefit from Gulf's past underdeliveries, and that the purpose of the refund-recoupment mechanism "is to force Gulf to live up to its obligations." App. 73a. The Commission also held that Gulf is not entitled to recoup the interest on the principal of its payments accrued after December 15, 1976. App. 81a-83a. Finally, the Commission ordered that the calculation of interest on the corpus

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[4] Some of the gas delivered by Gulf is priced at the Commission's minimum rate (approximately 29 cents per Mcf (18 C.F.R. § 271.101(a) (Table II)). The remainder of the gas is sold to Texas Eastern at approximately 21 cents per Mcf, the Contract price. Prices of alternative supplies exceed $3.00 per MMBTU under the Natural Gas Policy Act, 15 U.S.C. §§ 3301, *et seq.* (Supp. V 1981), enacted in 1978. See 18 C.F.R. § 271.101(a) (Table I).

of the refunds be changed retroactively to a formula using the "prime" rate and "compounding" methodology adopted in regulations promulgated in a separate rulemaking proceeding in 1979 instead of the 7% and 9% rates expressly prescribed in the 1976 orders in the Gulf proceeding. App. 85a.

5. *The* FORCE MAJEURE *Proceeding.* In response to the Commission's 1979 procedural order, Gulf submitted extensive evidence on the *force majeure* question. This evidence showed, in computer-printout format, summary factual data on over 43,000 *force majeure* occurrences, over a six year period, including dates, facilities involved, causes, and volumes that could not be delivered. App. 48a-49a. Gulf's testimony and exhibits described its internal procedures for reporting *force majeure* occurrences (App. 49a), and also described its efforts in maintaining deliveries to Texas Eastern, including an explanation of maintenance procedures and efforts to overcome *force majeure* occurrences. App. 49a-50a. No other party submitted evidence on the *force majeure* issues.

At the conclusion of Gulf's *force majeure* presentation, the Washington Urban League, with the support of other parties, moved to strike Gulf's evidence. App. 35a. The administrative law judge did not strike Gulf's evidence; however, he treated the motion as a motion for summary judgment against Gulf and ten months later granted it. App. 35a. He recognized that the Commission, having recognized applicability of *force majeure* in the refund-recoupment formula in 1976, could not "repeal it now that judicial review . . . has been completed." *Gulf Oil Corp.*, 11 F.E.R.C. 65265, 65269 (CCH 1980) (¶ 63041).

In separate orders in 1982, the Commission approved Gulf's claimed *force majeure* volumes. App. 31a, 53a. The Commission rejected claims that *force majeure* should be defined according to asserted "common usage." App. 41a-42a. According to the Commission, "[t]he *force majeure* provision, including its broad definition of that

term," is an "integral part" of the certificated contract, is not contrary to the public interest, and should not be abrogated. App. 42a. "[F]or purposes of the certificate in question and the refund formula, *force majeure* has [meant] and should mean *force majeure* as defined in Article X [the *force majeure* provision] of the contract." App. 43a. The Commission further found and concluded that the evidence satisfied the contractual requirements and substantial evidence test and approved Gulf's claimed *force majeure* volumes. App. 51a.

6. *The Third Circuit Opinion.* On review, the Court affirmed without discussion the orders on the refund-recoupment issues. App. 9a. This left standing the Commission's 1981 changes of its 1976 orders as to proof of damages, recoupment of interest, and rates of interest.

On the *force majeure* issues, the Third Circuit reversed, holding "that the Commission's definition of *force majeure* and its application of that definition was in legal error." App. 18a. This reversal of the *force majeure* order rested on four grounds.

First, citing *Sun Oil Co.* v. *FPC*, 364 U.S. 170, 176 (1960), and *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 157-158 (1960), the court of appeals held that "the mere fact that the Commission did not require the parties to change the underlying contract does not mean that the contract terms are controlling." App. 20a. Even though the 1963 certificate did not condition or otherwise limit the operation of the *force majeure* clause (App. 20a), the court of appeals was of the view that new restrictions now could be imposed (App. 25a-26a), and, in practical effect, imposed such new conditions in its application of the *force majeure* concept. App. 26a.

Second, the court of appeals ignored the explicit language of the *force majeure* provision and the applicable contract law principles followed by the Commission. Instead, relying on a supposedly "well settled principle" de-

rived from construction of federal government contracts' forms in *United States* v. *Brooks-Calloway Co.*, 318 U.S. 120 (1943), and *Jennie-O Foods, Inc.* v. *United States*, 580 F.2d 400, 408 (Ct. Cl. 1978), the court of appeals held that despite its terms, Gulf's *force majeure* provision did not apply to occurrences defined in the Contract and certificate which are "frequent, almost predictable" occurrences, but applies only to "unforeseen" or "unforeseeable and infrequent" events, even though these limitations are not contained within the Contract provision but were express limitations on *force majeure* in the government contract form. Thus, the court limited the *explicit* language of the Contract *force majeure* clause, such as "breakage or accidents to machinery or lines of pipe." App. 21a-23a.

Third, the Court ignored both the 1976 Commission orders and its own related decision in 1978 in *Gulf Oil Corp.* v. *FERC*, 575 F.2d 67 (3rd Cir.), which held that Gulf was *not* required to maintain "reserve" supplies in excess of the maximum volume which could be demanded from it. This time, the court of appeals held Gulf must "have available a larger amount of gas than 625 Mmcf so that it can supply the maximum amount per day when demanded." App. 20a. According to the court of appeals in 1983, to invoke *force majeure* "under the warranty contract, Gulf . . . must show that even though the events which delayed its performance were unforeseeable and infrequent that it had available at the time of their occurrence more than the maximum warranted quantity of gas." App. 22a.

Fourth, the court of appeals rejected the Commission's findings that Gulf had shown that it had exercised due diligence in attempting either to prevent or to overcome the *force majeure* events. App. 23a-26a. The court of appeals then made findings based on its view of the record evidence; dictated the methods, procedures, and other

aspects of the Commission's future inquiry into "due diligence"; and announced the evidence which must be submitted and the specific findings which the Commission must make. App. 24a-26a.

7. *Court of Appeals Rehearing.* Gulf's timely petition for rehearing and for rehearing en banc was denied by the Court on June 15, 1983. App. 113a-115a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the administration of the Natural Gas Act, the Natural Gas Policy Act, and the Federal Power Act.

I. THE COMMISSION'S MODIFICATION OF ITS PRIOR ORDERS ON REFUNDS AND RATES OF INTEREST IS PROHIBITED BY THE NATURAL GAS ACT, CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, AND RENDERS THE ORDERS UNLAWFUL UNDER THIS COURT'S CONSTRUCTION OF THE ACT.

In its 1976 orders, the Commission held that Gulf would be entitled to reduce its refunds to Texas Eastern if the evidence adduced in subsequent proceedings showed that the "damages" actually suffered by Texas Eastern's customers were less than the "refunds" determined under the Commission's orders, *Gulf Oil Corp.*, 56 F.P.C. 2293, 2307-2308 (1976); assessed simple interest on the "refunds" at 9% after October 10, 1974, *id.* at 2307; and held that both specific performance and unrecoupable "damages" could not be lawfully ordered, *id.* at 2301.

In the orders now on review, the Commission ignored explicit, binding provisions of its 1976 final orders and entered new orders which change drastically the substance of those orders. Contrary to statements that Gulf would be permitted to show that the "damages" sought to be remedied were less than the refunds required, the Commission held that its prior orders required Gulf to

make refunds at least equal to the amount computed under the Commission's formula (App. 70a-73a). The Commission also revised the rate of interest to be used after September 30, 1979 (App. 85a), and further changed the recoupment provision to bar future recovery of interest accrued after December 16, 1976 (App. 83a, 88a).

1. The Commission lacks authority so to modify orders which have been affirmed on appeal. Section 19(b) of the Natural Gas Act provides that the decision of a court of appeals on review of a Commission order "shall be final, subject" only to review by this Court. App. 120a-121a. Under Section 19(b), upon the completion of judicial review, an order of the Commission is final and binding on all parties, including the Commission, and is not subject to modification in subsequent proceedings. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336, 339-341 (1958).[8]

This Court therefore has held that the Commission lacks the authority to modify final orders which have been affirmed without qualification. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310-312 (1974); *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. at 229; *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); accord, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951). This Court has permitted the Commission to modify prior orders *only* when the prior order was reversed and not final, *United Gas Improvement Co.* v. *Callery Properties*, *supra*, or the affirmance by the court of appeals explicitly authorized the Commission to modify its order, *Mobil Oil Corp.* v. *FPC*, *supra*. Neither situation is presented here.

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[8] *City of Tacoma* construed Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) (App. 125a-126a), which, in all pertinent respects, is identical to Section 19(b). Thus, cases construing Section 313(b) are applicable to Section 19(b). *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n. 7 (1981); *Permian Basin Area Rate Cases*, 390 U.S. 747, 820-821 (1968).

In 1977, the court of appeals did not reverse the Commission's 1976 orders. Rather, it affirmed those orders without qualification. When this Court denied Gulf's petition for a writ of certiorari in 1978, those orders became final and binding. *City of Tacoma* v. *Taxpayers of Tacoma, supra.* The Commission thereafter lacked statutory authority to modify those orders.

The court of appeals' decision allowing the Commission to modify prior orders also conflicts with *Hirschey* v. *FERC*, 701 F.2d 215 (D.C. Cir. 1983). In *Hirschey*, the Commission took no action on an application for an exemption from the hydroelectric licensing provisions of the Federal Power Act, and that application was automatically granted. No person applied for rehearing within thirty days after the grant of the exemption as required by Section 313(a) of the Federal Power Act, (16 U.S.C. § 851*l*(a)) (App. 125a). After this time had expired, the Commission vacated the exemption, but the District of Columbia Circuit set aside the order, holding that under Section 313(a), 16 U.S.C. § 8251*l*(a), the Commission lacks authority to modify an order after time for seeking review has expired (701 F.2d at 217-218). The same rule applies under Section 19(b) of the Natural Gas Act.[6]

2. Results of the 1981 changes of the 1976 orders also render the orders substantively unlawful under this Court's construction of the Natural Gas Act.

In 1976, the Commission recognized the limits on its authority to order both specific performance and unrecoupable "damages." Its orders then were consistent with this Court's decisions that the Act does not authorize the Commission to order "reparations" or "damages" conflicting with prior orders under Sections 4 and 7 of the

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[6] Section 313(a), in all material respects, is identical to Section 19(a) of the Natural Gas Act.

Act. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611-613 (1944); *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 23-24 (1968); *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223 (1965); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578-579 (1981).

The 1981 modifications denying full future recoupment of interest payments, therefore, conflict not only with the 1976 orders as affirmed by the court of appeals, but also with this Court's constructions of the Act. The effect is to undermine the holdings of this Court and stability of prior, presumably final orders of the Commission. Therefore, on these issues as to refunds, "damages," and interest, the orders of the Commission and the court of appeals' affirmance warrant review by this Court.

II. THE COMMISSION RETROACTIVELY ORDERED CHANGES IN RATES OF INTEREST ON GULF'S PAYMENTS WITHOUT ADEQUATE NOTICE OR OPPORTUNITY TO BE HEARD.

In its 1976 orders, the Commission specifically directed that Gulf's remedy payments to Texas Eastern's customers should bear simple interest at 9% after October 10, 1974, and the court of appeals affirmed this rate of interest in 1977. *Gulf Oil Corp.* v. *FPC*, *supra*, 563 F.2d at 610 n.27, aff'g 56 F.P.C. at 2307. No retroactive or prospective modification of this rate of interest was provided for in the 1976 orders.

The Commission's orders issued in 1981 and 1982 (App. 85a, 93a-95a), as affirmed below, ignored those final orders and directed Gulf to recalculate and pay higher interest, retroactive to October 1, 1979. The Commission did so on the basis of orders issued in a separate, unrelated rulemaking proceeding which established general rates of interest to be applied to amounts collected subject to refund under Section 4 of the Natural Gas Act, pending a determination of "just and reasonable" rates,

and under Title I of the NGPA.[7] However, the Commission erred in its orders as to Gulf because it failed to provide Gulf any notice that the specific rates of interest on its remedy payments would be subject to retroactive change or be tied to Commission-ordered "general" rates of interest applicable to rates collected under Section 4 or Title I.

The 1976 orders of the Commission were specific as to the fixed rates of interest applicable to Gulf's remedy payments and nowhere suggest that those rates are subject to change or that the "general" interest rates applied to collections from purchasers subject to refund are to be used. Cf., *Shell Oil Co.* v. *FERC*, 664 F.2d 79, 83, 84 (5th Cir. 1981). Had the Commission intended its "general" interest rates to apply to Gulf's remedy payments, its intent should have been unambiguous and clear. *Mississippi Valley Gas Co.* v. *FERC*, 659 F.2d 488, 500 (5th Cir. 1981); *Louisiana Power and Light Co.* v. *FERC*, 587 F.2d 671, 675 (5th Cir. 1979).

Nor did the Commission's notice or orders in the rulemaking proceeding intimate that rates of interest adopted there would be made applicable retroactively or prospectively to Gulf's remedy payments. From their captions through their concluding paragraphs, the rulemaking notice and subsequently issued orders identify and refer to rates collected subject to refund under Section 4 of the Natural Gas Act in instances where a company files to

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[7] *Rate of Interest on Amounts Held Subject to Refund*, FERC Statutes and Regulations ¶ 30083 (CCH) (Order No. 47) (September 10, 1979), on reh., FERC Statutes and Regulations ¶ 30099 (CCH) (Order No. 47-A) (November 8, 1979). The Commission's notice of proposed rulemaking was published at 44 Fed. Reg. 18,046 (March 26, 1979). These orders provided that as of October 1, 1979, interest rates under Section 4 of the Natural Gas Act and under Title I of the NGPA should be computed using prime rates and should be compounded quarterly. See 18 C.F.R. §§ 35.19(a)(2), 154.67(d)(2), and 154.102(d)(2).

collect increased rates and where the Commission later finds that all or part of those collections were "unjust and unreasonable." Contrary to the requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3),[8] nowhere do the notice of proposed rulemaking or rulemaking orders provide sufficient notice to apprise Gulf that its remedy payments into an escrow account attributable to prior delivery deficiencies[9] would bear interest at the revised rates of interest adopted generally for *other* types of refunds. Thus, the Commission has attempted to circumvent the requirements of due process and the Administrative Procedure Act by modifying now-final orders as to Gulf without providing any notice that those orders could be changed.

The Commission similarly failed to comply with other procedural requirements of the Administrative Procedure Act, 5 U.S.C. §§ 553(b), (c), 554(b), (c), to the extent it can amend its prior orders as to Gulf, because the Commission gave no notice to Gulf that it would seek to change interest rates through the adjudicatory or rulemaking processes. An order changing the rates of interest is substantive and requires Commission compliance with the Administrative Procedure Act and notice and an opportunity to Gulf to be heard as to such a change.

Here, notice to Gulf was lacking. Contrary to established principles of due process and the procedures required by the Administrative Procedure Act, the final orders as to interest rates on Gulf's remedy payments have been disturbed. To preserve rights of due process, this issue warrants review by this Court.

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[8] See, *e.g.*, *Actions for Children's Television* v. *FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977).

[9] In 1977, the court of apeals compared Gulf's remedy payments to a "temporary performance bond," *Gulf Oil Corp.* v. *FPC*, *supra*, 563 F.2d at 608, which would secure Gulf's future performance.

III. THE DECISION OF THE COURT OF APPEALS ON THE *FORCE MAJEURE* ISSUES IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND IMPERMISSIBLY INTRUDES UPON THE COMMISSION'S AUTHORITY.

In reversing the Commission's order approving Gulf's *force majeure* volumes, the court of appeals acted contrary to decisions of this Court and other courts of appeals and also has impermissibly intruded upon the Commission's exclusive authority under the Natural Gas Act. Issues involving *force majeure* now are arising with increasing frequency before the Commission and in state and federal court litigation over natural gas contracts. For these reasons and those set forth *infra*, the court of appeals' decision on the *force majeure* issue should be reviewed by this Court and the order of the Commission reinstated and affirmed.

1. The court of appeals first erred in holding that "the mere fact that the Commission [in 1963] did not require the parties to change the underlying contract does not mean that the contract terms are controlling [in 1983]" App. 20a. This holding conflicts with decisions of this Court and other courts of appeals that in the absence of express conditions which are imposed at the time of issuance of a certificate under Section 7 of the Natural Gas Act and which limit the operation of the contract, those contractual provisions subsequently govern the rights and obligations of the parties.

The court of appeals seriously misapprehended and grossly misapplied this Court's decisions in *Sun Oil Co.* v. *FPC*, *supra*, and *Sunray Mid-Continent Oil Co.* v. *FPC*, *supra*. *Sun* and *Sunray* do *not* hold that in the absence of conditions in the certificate, the contract terms may be disregarded, as assumed by the court of appeals. These cases involve *statutory* requirements that "service" must continue until the Commission affirmatively grants an abandonment. *Sunray* holds only that the Commission is

not required to issue a certificate under Section 7(c) limited in duration to the term of the seller's contract, but may require the seller to accept or reject a certificate of unlimited duration or forego the interstate sale. 364 U.S. at 141. *Sun* establishes only the corollary principle that unless a certificate contains a term expressly limiting its duration, it is of unlimited duration as a matter of law under Sections 7(b) and 7(c). 364 U.S. at 174-176. Neither decision supports the court of appeals opinion, and Section 7(b) and "abandonment" are not involved in this case.

In this case, the controlling principles and decisions of this Court, which the court of appeals ignored, hold that during its term, and in the absence of orders expressly limiting its provisions, the contract, as filed with and certificated by the Commission, determines the rights and obligations of the parties. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338-339, 342-345 (1956); *Freeport Oil Co.* v. *FERC*, 638 F.2d 702, 715-716 (5th Cir. 1980); *Phillips* v. *FERC*, 586 F.2d 465, 469-470 (5th Cir. 1978). "The regulatory system created by the [Natural Gas] Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968).[10]

The Commission, of course, may include conditions in a certificate limiting the operation of contractual provisions during the term of the contract. Natural Gas Act, § 7(e), 15 U.S.C. § 717(e); *Freeport Oil Co.*, *supra*, 638 F.2d at 715. If such conditions are included in the certificate, they " 'must be supported by soundly-based findings in the record . . . .' " *Id.*, quoting *Pure Oil Co.* v. *FPC*,

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[10] See also, *California Oil Co.* v. *FPC*, 315 F.2d 652, 656 (10th Cir. 1963); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F.2d 60, 67 (6th Cir. 1955).

292 F.2d 350, 352 (7th Cir. 1961). In this case, however, no condition in Gulf's 1963 certificate limited the operation of the *force majeure* clause and the Commission expressly so found. App. 42a-43a. The Commission also found that no circumstances of unequivocal public necessity justified abrogating or restricting the operation of the *force majeure* clause in 1982. App. 42a n.11.

Ignoring the Commission's interpretation of its own certificate and view of any "public interest" requirement for restrictive conditions,[11] the court of appeals thus imposed a new "condition" that the Commission found did not exist in the certificate. The court of appeals concluded that the *force majeure* clause should be given effect only if it was limited to "unforseen" and "infrequent" events. App. 22a. In so acting, the court of appeals intruded upon the Commission's exclusive authority.

While the court of appeals possesses authority "to affirm, modify, or set aside [the Commission's] order in whole or in part" (Natural Gas Act § 19(b), 15 U.S.C. § 717r(b)), "that authority is not power to exercise an essentially administrative function." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 21 (1952). When the court of appeals decided that the operation of the *force majeure* clause should be restricted, "it usurped an administrative function." *Id.*, 344 U.S. at 20.

Whether or not a particular condition should be included in a certificate is a decision for the Commission, not the court of appeals, because "Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, not the preferences of reviewing courts." *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 767.

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[11] The Commission's interpretation of its certificate is entitled to deference. See, *e.g.*, *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558 (1958).

2. It also is well established that contracts for the sale of natural gas subject to regulation under the Natural Gas Act are to be interpreted in accordance with applicable state law. *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 383-387 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982).[12] In its order, the Commission held, consistent with state contract law, "that *force majeure*, for purposes of the refund formula, should be defined in accordance with Article X [the *force majeure* clause] of the contract," and the intent and "bargain" of the parties. App. 42a. The Commission then rejected arguments that the term should be defined "according to common usage or a common law definition rather than the specific definition set forth in the contract." App. 42a. The court of appeals reversed, holding that the *force majeure* clause should be interpreted by applying the supposedly "well established" rule of federal government contracts law stated in *United States* v. *Brooks-Callaway Co.*, 318 U.S. 120 (1943).

The court of appeals, however, did not determine whether this principle is consistent with either applicable state contract law or "general" principles of contract law. By failing to make this determination, the court of appeals rendered a decision which conflicts with prior decisions of this court and decisions of other courts of appeals in cases involving *force majeure* and other issues as to regulated contracts.

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[12] Accord, *Premier Resources, Ltd.* v. *Northern Natural Gas Co.*, 616 F.2d 1171, 1180 (10th Cir.), cert. denied, 449 U.S. 827 (1980); *Phillips* v. *FERC*, 586 F.2d 465, 468-470 (5th Cir. 1978); *Sam Rayburn Dam Electric Corp.* v. *FPC*, 515 F.2d 998, 1009 (D.C. Cir. 1975), cert. denied, 426 U.S. 907 (1976); see, *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270-277 (1960) (implying that state law governs the interpretation of natural gas contracts); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950) (state law governs disputes arising under natural gas contracts); see, *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966) (state law governs validity of assignment of mineral leases acquired from the United States).

3. Contrary to the court of appeals (App. 18a-19a), in *Brooks-Calloway*, this Court did not establish a "general principle" to be applied in interpreting all *force majeure* clauses. The *Brooks-Calloway* rule applies only to clauses which are expressly limited to "unforeseeable" events. 318 U.S. at 120 n.1. The "general" rule consistent with this Court's holding is stated in *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 992 (5th Cir. 1976):

> [A] promisor can protect himself against foreseeable events by means of an express provision in the agreement.
>
> Therefore, when the promisor has anticipated a particular event by specifically providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable.

The *force majeure* clause in Gulf's Contract contains *no* language which, explicitly or implicitly, excuses performance only if the event causing nonperformance is "unanticipated," "unforeseen," or "irregular". Instead, that clause lists the events which will excuse performance *whether* foreseen *or* unforeseen, including, *inter alia*, "storms, . . . breakage or accidents to machinery or lines of pipes, [and] the necessity for making repairs to or alterations of machinery or lines of pipe . . . ." App. 11a. "[T]here is no indication from the wording of the [*force majeure*] clause that [Gulf's] defenses are to be limited to breaches caused by unforeseen events." *Eastern Air Lines, supra*, 532 F.2d at 992. Storms or hurricanes are certainly foreseeable in the Gulf of Mexico over a twenty-six year contract term. Nevertheless, shut ins due to hurricanes are almost text book cases of *force majeure* and were included in the contract between the parties.

Thus, the court of appeals erred in two major respects. First, it misapplied this Court's decision in *Brooks-Calloway* and reached a decision which conflicts with the

decision in *Eastern Air Lines*. Second, in failing to give effect to the express language of the *force majeure* clause, the court of appeals entered a decision which conflicts with this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, *supra*, and the Fifth Circuit's decision in *Pennzoil*, both of which hold that the express language of the contract controls. Moreover, the court of appeals analysis conflicts with the applicability of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), correctly applied in *Pennzoil* but ignored by the Third Circuit in this case. This Court should exercise its supervisory authority, review the decision below, and reverse the decision of the court of appeals. The Commission's orders on the *force majeure* question, which are based upon correct principles of contract construction and source of law, must be affirmed.

4. The question of which rules of reference and contract law principles govern the interpretation of natural gas contracts is of importance in the administration of the Natural Gas Act. For years, courts have held that natural gas contracts are to be interpreted by reference to state law. See, *e.g.*, *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, *supra*; *Pennzoil Co.* v. *FERC*, *supra*. Parties to natural gas contracts have acted on the basis of these holdings. The court of appeals' decision here is contrary to this longstanding line of decisions and to the understanding on which contracting parties have proceeded.

Unless reversed by this Court, the court of appeals decision will create uncertainty in the natural gas industry as to the applicable source of law, particularly on issues of *force majeure* now arising with frequency. In recent months, numerous actions have been initiated by natural gas producers and interstate pipeline companies in which a principal issue is whether the current market situation of reduced demand and over supply constitutes an occurrence allowing the suspension of pipeline takes of gas

under long-term contracts and the avoidance of millions of dollars in pipelines' contractual take-or-pay obligations.[13] These actions, both before the Commission and in

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[13] See, *e.g.*, Tennessee Gas Pipeline Co., a Division of Tenneco, Inc. v. Amoco Production Co., *et al.*, FERC Docket No. RP83-109 (Complaint, Request for Evidentiary Hearing and for Expedited Consideration, and Petition for Declaratory Orders); Columbia Gas Transmission Corp., FERC Docket No. CI83-304 (Petition for Declaratory Order); Chevron U.S.A. Inc. v. Columbia Gas Transmission Corp., U.S.D.C. W.D. La. No. CV 83-2029 (Complaint for Declaratory Judgment, Specific Performance, Preliminary and Permanent Injunction); Exxon Corp. v. Columbia Gas Transmission Corp., U.S.D.C., W.D. La. No. CV83-1586 (Complaint for Declaratory Judgment, Specific Performance and a Permanent Injunction); Union Oil Co. of California v. Columbia Gas Transmission Corp., U.S.D.C. S.D. Tex. Civil Action No. H-83-3905 (Plaintiff's Original Complaint); Amoco Production Co. v. Columbia Gas Transmission Corp., Civil District Court for the Parish of Orleans, State of Louisiana, No. 83-11570 (Petition for Specific Performance and Declaratory Judgment); GHR Energy Corp. v. Natural Gas Pipeline Co. of America, 49th Judicial District Court, Webb County, Texas, No. 34,392, removed to U.S.D.C., S.D. Tex. Civil Action No. L-83-20 (Plaintiff's Original Petition and Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction and Declaratory Judgment); Tema Oil Co. v. Northwest Central Pipeline Corp., U.S.D.C. W.D. Ok. No. CIV-83-828W (First Amended Complaint); Northwest Central Pipeline Corp. v. Mesa Petroleum Co. and Tenneco Oil Co., Court of Chancery for the State of Delaware, in and for New Castle County, Civil Action No. 7159, petition for removal pending, U.S.D.C. D. Del. Civil Action No. 83-282; Kaiser-Francis Oil Co. v. Northern Natural Gas Co., District Court in and for Tulsa County, Oklahoma, No. C-82-3291 (Petition); Samson Resources Co. v. Northern Natural Gas Co., U.S.D.C. N.D. Ok. No. 82-C-1214-E (Complaint); Amoco Production Co. v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-2988-I (Petition for Specific Performance and Declaratory Judgment); Chevron U.S.A. Inc. v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-3260-H (Petition for Declaratory Judgment, Specific Performance, permanent Injunction, Preliminary Injunction, Temporary Restraining Order); Exxon Corp v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-3291 (Petition for Declaratory Judgment, Specific Performance and Per-

federal and state courts, involve the explicit questions of interpretation of *force majeure* provisions, source of law, and the Commission's authority under the Natural Gas Act.

The novel and unprecedented holdings of the court of appeals below that the language of the contract (including express *force majeure* provisions) is irrelevant and that state law is not the source of law to be applied will create widespread and unnecessary confusion and prolonged litigation. This Court should exercise its jurisdiction, review the court of appeals' decision, and decide

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manent Injunction); Gulf Oil Corp. v. Tenneco Inc., United States District Court for the Eastern District of Louisiana, No. 83-2714 (Complaint); Kerr-McGee Corp. v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-3870-B (Petition for Declaratory Judgment, Specific Performance and Preliminary Injunction); The Louisiana Land and Exploration Co. v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-3112-B (Petition for Preliminary Injunction, Permanent Injunction and Declaratory Judgment); Moore McCormack Oil & Gas Corp. v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-3686-E (Petition for Preliminary Injunction, Permanent Injunction, Specific Performance and Declaratory Judgment and Damages); Placid Oil Co. v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-3566-E (Petition for Declaratory Judgment and Damages); Sanchez-O'Brien Oil & Gas Corp. v. Tenneco Inc., 49th Judicial District Court, Webb County, Texas, No. 34,579 (Plaintiff's Original Petition); J.E. Stack, Jr. v. Tenneco Inc., Circuit Court of Lauderdale County, Mississippi, No. 1550-H (Complaint for Declaratory Judgment, Breach of Contract and Punitive Damages); The Superior Oil Co. v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-3053-A (Petition); System Fuels, Inc., Tomlinson Interests, Inc., and Pan-Canadian Petroleum Company v. Tenneco Inc., Chancery Court of Marion County, Mississippi, No. 19,494 (Complaint for Injunctive Relief, Specific Performance, Declaratory Judgment, Breach of Contract and Punitive Damages); Texaco Inc. v. Tenneco Inc., 15th Judicial District Court, Parish of Lafayette, State of Louisiana, No. 83-3211-A (Petition for Specific Performance and Damages and First Supplemental Amending Petition for Specific Performance and Damages).

whether interstate natural gas sales contracts, including *force majeure* provisions, are unlike other commercial agreements and are to be interpreted according to the law of federal contracts, or whether the interpretation of gas contracts is governed by state law and the specific terms of the agreements at issue.

5. The court of appeals also held that the Commission erred in finding that Gulf had exercised due diligence in attempting to prevent or reduce the impact of various *force majeure* occurrences. App. 23a-24a. The court of appeals then specified, in great detail, the evidence which Gulf must submit and the particular findings which the Commission must make. App. 24a-26a.

On this question, the court of appeals first erred in holding that federal contract law, as applied in *Brooks-Calloway*, rather than state contract law, supplies the rules to be applied in determining whether Gulf had exercised due diligence. See pages 7-8, 18-20, *supra*. Second, the court of appeals' specification of the evidence which must be submitted and the findings which must be made is inconsistent with the limited function of a reviewing court under Section 19(b) of the Natural Gas Act. "[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-334 (1976). The reviewing court is not to supplant the Commission's decision "with one more nearly to its liking" (*Mobil, supra*, 417 U.S. at 308), but is to reverse only for legal error. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

Here, the court of appeals supplanted the Commission's decision on *force majeure* with one it preferred. Instead of simply determining whether the Commission's judgment "had no basis in evidence" and was "devoid of reason," *United States ex rel. Chapman* v. *FPC*, 345 U.S. 153, 171 (1952), the court of appeals "dictated" "the methods, procedures, and time dimensions" of the Com-

mission's inquiry into "due diligence" and announced specific findings required as to Gulf's performance. This is contrary to the limited function of a reviewing court under Section 19(b). *FPC* v. *Transcontinental Gas Pipe Line Corp., supra*, 423 U.S. at 333; *accord, Vermont Yankee, supra*, 435 U.S. at 543, 549-555. In so specifying evidence which the Commission must include in a record and findings that the Commission must make, the court of appeals "usurped an administrative function." *FPC* v. *Idaho Power Co., supra*, 344 U.S. at 20; accord, *e.g.*, *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 465-466 (1972). The court of appeals thus erred, and its decision must be vacated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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